LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 599

ALBERT FREED,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO APPELLATE PART OF THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, SECOND JUDICIAL DEPARTMENT

SIDNEY G. SPARROW,
125-10 Queens Boulevard,
Kew Gardens, Queens, New York,
Counsel for Petitioner.

JOSEPH WINSTON,
Of Counsel.

THE ALBERT PRESS, INC. — TRIANGLE 5-1058-1059

TABLE OF CONTENTS

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

1. May the State Court find a waiver of a Federally protected constitutional right against unlawful search and seizure because of failure of counsel to raise an objection at a time when under existing State law such objection would have been overruled and futile 2

2. Is a holding by the New York State Court of Appeals reasonable that failure by counsel to object to unconstitutional search and seizure, constitutes a waiver of constitutional right when in fact to have objected at the time would have been a meaningless gesture 3

3. Does it violate the Federal Constitution for the Appellate Part of Special Sessions of New York to hold that it was necessary for counsel to object to an unlawful search and seizure at a time when such objections had to be overruled as a matter of law by the State Court prior to *Mapp* v. *Ohio*, 367 U. S. 643 3

4. Is it not a strange doctrine that a lawyer who is ignorant of the law and objects to an unconstitutional search and seizure can raise the question of unlawful search and seizure on appeal but the conscientious lawyer who follows the State law as it exists at the time, is precluded from raising the same question on appeal 3

Constitutional Provisions and Statutes Involved 4

Statement of Facts 4

PAGE

Reasons for Allowance of Writ 6

Conclusion 6

Appendix—Judgment of Appellate Part of Special Sessions of New York 1a

Appendix B—Certificate Denying Leave to Appeal to Court of Appeals 3a

Table of Cases

Mapp v. *Ohio*, 367 U. S. 643 (1961) 2, 3, 6

People v. *Coffey*, 11 N. Y. 2d 142 (1962) 3

People v. *DeFore*, 242 N. Y. 13 (1926) 3

People v. *Friola*, 11 N. Y. 2d 137 (1962) 2, 3, 6

People v. *Loria*, 10 N. Y. 2d 368 (1961) 3

People v. *Richter's Jewelers*, 291 N. Y. 161 (1943) 3

Wolf v. *Colorado*, 338 U. S. 25 (1949) 3

Statutes

Constitution of the United States of America, Amendments IV and XIV 2, 4, 6

Penal Law of the State of New York, Sections 986 and 986-b 1, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

ALBERT FREED,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO APPELLATE PART OF THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, SECOND JUDICIAL DEPARTMENT

The petitioner, Albert Freed, prays that a Writ of Certiorari issue to review a decision of the Appellate Part of the Court of Special Sessions of the City of New York in and for the Second Judicial Department in the County of Kings, dated March 7, 1962 affirming the conviction of Albert Freed of violating Sections 986 and 9861 of the Penal Law of the State of New York and sentencing him to Five Hundred ($500.00) Dollars or Sixty (60) Days in the workhouse together with a jail sentence of three months in the workhouse. On September 20, 1962 Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York denied leave to review the above conviction by the Court of Appeals.

OPINIONS BELOW

The opinion of the Appellate Part of the Court of Special Sessions is not reported. Attached hereto and made part hereof as Appendix A is the order of the said Court affirming the judgment of conviction of the Court below. No opinion was rendered by Hon. Stanley H. Fuld of the Court of Appeals in denying leave to appeal to the Court of Appeals. A copy of this certificate denying leave is attached hereto and made part hereof as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under the Fourth and Fourteenth Amendments to the United States Constitution securing the right of the defendant to be secure in his person or property against unreasonable searches or seizures under which all evidence seized as a result of an illegal search and seizure, absent the presence of a search warrant, is inadmissible in evidence and in violation of the Federal Constitution.

QUESTIONS PRESENTED

1. May the State Court find a waiver of a constitutional right of unlawful search and seizure because of failure of counsel to raise an objection at a time when under existing State law such objection would have been overruled and futile. In this connection the petitioner calls this Court's attention to the dissenting opinion of Judge Desmond in *People* v. *Friola*, 11 N. Y. 2d 137, where Judge Desmond stated:

> "* * * yet in the present case we are creating an unfair, illogical and inconsistent limitation of the general rule. We are now saying that we will not apply the new law in a pre-*Mapp* case, unless on the

trial, the defendant's counsel did what was then futile, unreasonable and contrary to the then law, that is, object to the admission of testimony which under the unquestioned New York and Federal Law (*People v. DeFore*, 242 N. Y. 13; *Wolf v. Colorado*, 338 U. S. 25) was clearly admissible. So the client whose counsel took a groundless objection, gets the benefit of the later *Mapp* change in law, while the client whose lawyer refrained from mouthing a meaningless objection, is prejudiced because his lawyer took the correct position."

2. Is a holding by the New York State Court of Appeals reasonable that failure by counsel to object to unconstitutional search and seizure, constitutes a waiver of constitutional right when in fact to have objected at the time would have been a meaningless gesture under *Wolf v. Colorado*, 338 U. S. 25; *People v. Richter's Jewelers*, 291 N. Y. 161; *People v. DeForce*, 242 N. Y. 13, cert. den. 270 U. S. 585; *People v. Loria*, 10 N. Y. 2d 368; *People v. Coffey*, 11 N. Y. 2d 142; *People v. Friola*, 11 N. Y. 2d 157; *Mapp v. Ohio*, 367 U. S. 643.

3. Does it violate the Federal Constitution for the New York Court of Appeals to hold that it was necessary for counsel to object to an unlawful search and seizure at a time when such objection had to be overruled as a matter of law by the State Court prior to *Mapp v. Ohio*, 367 U. S. 643?

4. Is it not a strange doctrine that a lawyer who is ignorant of the law and wrongfully objects to an unconstitutional search and seizure at the time can later raise the question of unlawful search and seizure on appeal but the conscientious lawyer who follows the State Law as it exists at the time, is precluded from later raising the same question on appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendments IV and XIV.

STATEMENT OF FACTS

At the trial, conducted before Hon. Thomas Fitzpatrick, the arresting officer, Detective Michael Casale, testified that on the day in question, he observed the defendant during a period of ten minutes being approached by three different persons at separate intervals, that on each of the first of the two occasions, the defendant and the unknown man entered the hallway, that after the third man had entered the hallway with the defendant, he, the officer, entered and saw the third man handing a piece of paper to the defendant which paper was thereafter entered in evidence as People's Exhibit 1, and allegedly contained nine (9) bets of horses from that day but did not contain any identification. The officer further testified that upon searching the defendant, he found in his waistband two other slips (People's Exhibits 2 and 3) and One Hundred Five ($105.00) Dollars; that the defendant made no statement. He stated that People's Exhibits 2 and 3, as well as 1, had no identification of a bettor and still indicated that in his opinion these were the records kept by a bookmaker.

On cross-examination, the officer sought to testify that Exhibit 2 was a record made by a bookmaker as distinguished from a player. Cross-examination elicited a most incredible series of responses indicating that obviously each of the three People's Exhibits were papers such as would have been written by a player as distinguished from a bookmaker.

The officer testified further that there were no identifications on any slip (p. 17) no money passed between the defendant and any of the three persons, that no conversation

was overheard at any time, no scratch sheet or other bookmaking paraphernalia were found upon the person of the defendant (pp. 17 and 18).

The defendant's motion at the end of the People's case to dismiss for failure to make out a prima facie case was denied as to each of Sections 986 and 986b.

The defendant thereupon took the stand and testified that he had been convicted in excess of ten times but that he had completely desisted from such practice after September 1, 1960, and that he has been a horse bettor all of his life, is thoroughly familiar with bets and bettors slips, has handled more slips "than he had hairs on his head," and states unequivocably that People's Exhibits 1, 2 and 3 are, in fact, slips such as would be written by a player and not by a bookmaker.

The defendant further testified that he had owned a retail paint and wallpaper store for more than twenty years, was now self-employed, and invested in the stock market and does materially well.

As to the Exhibits, he testified that People's Exhibit 1 was, in fact, his own bet and wager, that he had written it in his own handwriting and thereupon wrote a specimen for the Court which was introduced as Defendant's Exhibit A and apparently was in the identical handwriting, nor was this contested or disputed.

The defendant further stated that he was going to play with a book if he found him and that nobody had given him any bet or wager that day, although he was going to deliver the two pieces of paper in his waistband to a bookmaker if he located one.

The defendant took the position that the admission by the Court into evidence of any of the People's Exhibits, they being the fruits of an unreasonable search and seizure, without probable cause or other warrant, was error and violated

the appellant's constitutional rights as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

REASONS FOR ALLOWANCE OF WRIT

As a result of *Mapp* v. *Ohio*, 367 U. S. 643, the New York Courts have been obliged to extend the protection of the Fourth Amendment prohibiting unreasonable searches and seizures, to the State Courts. However, they have not done so wholeheartedly. They are, without justification or reason, now taking the position as set forth in *People* v. *Fiola*, 11 N. Y. 2d 157, that any defendant in the State Court who did not preserve his rights on trial against an unconstitutional search and seizure, can no longer claim the benefits of the *Mapp* rule. As dissenting Judges Desmond and Fuld so rightly held, this new doctrine places a premium upon the stupid lawyer who mouths meaningless objections. The well informed lawyer and his client are as a result of this startling doctrine deprived of federally created constitutional rights. Certainly a State Court should not, in enunciating an arbitrary rule designed to restrict the beneficent effects of *Mapp* v. *Ohio*, deprive defendants of federally created constitutional rights.

CONCLUSION

FOR THE FOREGOING REASONS THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: October 26, 1962.

Respectfully submitted,

SIDNEY G. SPARROW,
125-10 Queens Boulevard,
Kew Gardens, Queens, New York,
Counsel for Petitioner.

JOSEPH WINSTON,
Of Counsel.

APPENDIX A

(Judgment of Appellate Part of Special Sessions)

Docket No. 41-Q-61

At an Appellate Part of the Court of Special Sessions of the City of New York, held in and for the Second Judicial Department, in the County of Kings, on the 7th day of March, 1962.

Present: Hon. Ludwig Glowa,
" Arthur Dunaif,
" J. Randall Creel,
Justices.

The People of the State of New York,
Respondent,

—against—

Albert Freed,
Appellant.

Heretofore, and on the 30th day of March, 1961, the defendant-appellant, Albert Freed, having been tried and convicted upon the charge of Vio. Sec. 986 & 986b of the Penal Law, by Hon. Thomas Fitzpatrick, a City Magistrate, at the Gamblers District City Magistrates' Court, in the Borough of Queens, City of New York and sentenced as follows:

$500 or 60 and 3 months Workhouse

and an appeal by Albert Freed from the judgment aforesaid having been taken to this Court on the 19th day of April,

1961, and the said appeal having been argued by Mr. Sidney G. Sparrow, of counsel for the Appellant, and by Mr. Frank D. O'Connor, by Kenneth N. Browne, of counsel for the Respondent; and due deliberation having been had thereon, it is

ORDERED AND ADJUDGED, that the said judgment so appealed from be and the same is hereby in all respects affirmed. Dunaif & Creel, *JJ.* concur. Glowa, *P.J.*, dissents and votes to reverse and send back for new trial. No opinion.

Enter,

LUDWIG GLOWA,
Justice Presiding.

APPENDIX B

(Certificate Denying Leave)

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. STANLEY H. FULD, *Associate Judge*.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

ALBERT FREED,
Defendant-Appellant.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York,
September 20, 1962.

STANLEY H. FULD,
Associate Judge.

LIBRARY
SUPREME COURT U S

Office-Supreme Court, U.S.
FILED
DEC 20 1962
JOHN F. DAVIS, CLERK

No. 599

IN THE

Supreme Court of the United States

October Term, 1962

ALBERT FREED,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

FRANK D. O'CONNOR,
District Attorney
Queens County

BENJ. J. JACOBSON,
Assistant District Attorney
of Counsel

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1962

ALBERT FREED,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

Statement

Petitioner seeks review by a writ of certiorari of a judgment of the Court of Special Sessions of the City of New York, Appellate Part, Second Judicial Department, made and entered on March 7, 1962 which affirmed a judgment of conviction of the Magistrates' Court of the City of New York rendered on April 19, 1961, convicting petitioner, after trial, of the crime of bookmaking (New York Penal Law, §§986 and 986-b).

Reargument of the appeal was denied by order made on July 26, 1962.

Leave to appeal to the Court of Appeals of the State of New York from the judgment of affirmance of the Court of

Special Sessions of the City of New York, as required by section 528 of the New York Code of Criminal Procedure, was denied by Hon. Stanley H. Fuld, Associate Judge of the said Court of Appeals, on September 20, 1962.

Record Facts Material to the Question Presented

Trial of the defendant was had on March 30, 1961.

Detective Michael Casale testified for the prosecution that on December 23, 1960, at about 1:40 p.m., he had defendant under observation for about ten minutes in front of a building containing a store on the street floor and two families above; that during that period three men, at separate intervals, approached petitioner and conversed with him; that after a short conversation with the second man, the petitioner and that man entered the hallway of the building in front of which they were standing and emerged a short time later; that this performance was repeated with the third man who approached petitioner, at which point he (Casale) entered the hallway and saw the unknown man hand a slip of paper to petitioner; and that he (Casale) thereupon identified himself as a police officer, placed petitioner under arrest and took from petitioner's hand the slip of paper which the unknown man had given to petitioner, as well as two other slips of paper from the waistband of petitioner's trousers. These slips, Casale testified, contained wagers on horse races.

When the slip of paper which Casale saw the unknown man hand to petitioner and which Casale took from petitioner's hand was offered in evidence, petitioner's counsel (who is also his counsel upon this petition for certiorari)

stated, "I have no objections." * Again, when the slips taken from the waistband of petitioner's trousers were offered in evidence, the same counsel also stated, "I have no objection." *

ARGUMENT

POINT ONE

Since the determination of the Court of Special Sessions might have rested on an adequate non-federal ground, certiorari by this court should not be granted.

In affirming the judgment of conviction the Court of Special Sessions rendered no opinion. It therefore does not appear from the record whether such affirmance was on the basis that the failure to object to the admission into evidence of the slips of paper now claimed to have been illegally seized constituted a waiver of such claim. However, in the petition for certiorari it is assumed that under New York law the failure to object to the admission of evidence upon the ground that it was obtained in violation of the Fourth Amendment of the United States Constitution constitutes a waiver of such claim, that such failure to object is fatal to such claim upon appeal, and that the affirmance by the Court of Special Sessions was upon that ground. And as authority for this, cases of the New York State Court of

* In the statement of facts describing what occurred at the trial, at the bottom of page 5, it is stated that "The defendant took the position that the admission by the court into evidence of any of the People's Exhibits, they being the fruits of an unreasonable search and seizure, without probable cause or other warrant, was error and violated the appellant's constitutional rights * * *." In view of the express waiver of objection in the record of this evidence, this obviously is not a correct statement.

Appeals holding that failure "to object to unconstitutional search and seizure, constitutes a waiver of constitutional right * * *" are cited (pet., p. 3).

In this, petitioner is incorrect. Though an objection is required to give the New York State Court of Appeals' jurisdiction to review an affirmance by a lower appellate court of a conviction (New York State Constitution, art. 6, §7), this was not true (at the time of this appeal) as to the Court of Special Sessions, to which court petitioner seeks the issuance of a writ of certiorari. For section 50 of the New York City Criminal Courts Act provided, so far as pertinent here, as follows:

> "After hearing the appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence. * * *."

In any event, so far as appears from the record, the judgment of the Court of Special Sessions might have rested on an adequate non-federal ground. In that case, this court lacks jurisdiction to review by a writ of certiorari. *Murdock* v. *City of Memphis* (1874) 87 U. S. [20 Wall] 590, 636; *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 547; *Durley* v. *Mayo* (1955) 351 U. S. 277, 284-285. In fact, this court has dismissed a writ of certiorari where it was "unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground * * *." *Phyle* v. *Duffy* (1947) 334 U. S. 431, 441, rehearing den. 334 U. S. 862.

Moreover, the question always is whether decision of a claim under the Fourteenth Amendment is necessary to the judgment rendered. *Loftus* v. *Illinois* (1947) 334 U. S. 804, 806; also see *Edelman* v. *California* (1952) 344 U. S. 357, 358-9. But it does not appear from the record that this obtains here. Therefore, jurisdiction in the matter is also lacking for this reason.

POINT TWO

The constitutional right to be secure against unreasonable searches and seizures may be waived by failure to assert it.

The predicate of petitioner's claim in this proceeding is that holding a defendant to the failure to raise a claim of illegal search and seizure in a state which prior to *Mapp* v. Ohio (1961) 367 U. S. 643 held such evidence nevertheless admissible violates due process under the Fourteenth Amendment.

It has been settled under federal law for many years that a claim that evidence is inadmissible because it was obtained by unlawful search and seizure cannot be raised on appeal in the absence of objection at the trial or the failure to move to suppress. *Zachary* v. *United States*, (1960) 275 F. 2d 793, 795-796; *United States* v. *Sheba Bracelets*, (1957) 248 F. 2d 134, 142-144; *United States* v. *Romero*, (1957) 249 F. 2d 371, 374; *United States* v. *Sferas*, (1954) 210 F. 2d 69, 73-74; *United States* v. *Hershkowitz*, (1953) 209 F. 2d 881, 886; also see *Agnello* v. *United States*, (1925) 269 U. S. 20, 34-35; *Segurola* v. *United States*, (1927) 275 U. S. 106, 111-112; *Jordan* v. *United States* (1958) 254 F. 2d 710,

712. That the same constitutional standard is applicable to the states requires no argument. And the fact that before *Mapp* a state may have held illegally seized evidence nevertheless admissible under the doctrine of *Wolf* v. *Colorado* (1949) 338 U. S. 25 does not alter this standard so that in such case the failure to object to such evidence would not constitute a waiver.

The contention made by petitioner that the refusal of the New York Court of Appeals to consider a claim of unlawful search and seizure in the absence of an objection in a pre-*Mapp* case "places a premium upon the stupid lawyer" and the "well informed lawyer and his client are * * * deprived of federally created constitutional rights" not only is unpersuasive to establish a deprivation of due process but is ill-advised. To begin with, the constitutional objection was made in the *Mapp* trial at a time when Ohio did not have the exclusionary rule. Even in New York objections were made to the admission of illegally seized evidence prior to *Mapp*, when *People* v. *Defore* (1926) 242 N.Y. 13, cert. den. 270 U. S. 585, was the controlling law. See *People* v. *Loria*, (1961) 10 N Y 2d 368; *People* v. *O'Neill*, (1962) 11 N Y 2d 148; *People* v. *Yarmosh*, (1962) 11 N Y 2d 397; *People* v. *Coffey* (1962) 11 N Y 2d 142. Moreover, this petitioner's counsel, in the case of *People* v. *Amendolare* (which was argued in the New York Court of Appeals on December 6, 1962 and in which respondent confessed error and consented to a reversal of the conviction) raised the question of the legality of the seized evidence by cross-examining a police officer as to whether he had a search warrant to make a search. Cf. *People* v. *O'Neill*, *supra*. The fatal rationale against petitioner's postulate that the absence of an objec-

tion to illegally seized evidence in New York prior to *Mapp* was forcefully and cogently set forth in the concurring opinion of Judge VanVoorhis in *People* v. *Friola*, 11 N Y 2d 157, at pp. 160-161:

> "It was well known before *Mapp* v. *Ohio* (367 U. S. 643) was decided that *Wolf* v. *Colorado* (338 U. S. 25) and *People* v. *Defore* (242 N.Y. 13) had been widely criticized, and Bench and Bar expected that their doctrines would be reviewed and possibly overruled. That is the reason on account of which the issue was presented to the Supreme Court in *Mapp* v. *Ohio* after adequate objection had been made at the trial of that case. Courts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed. That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made. It is important to know at the time that rulings are being challenged so that additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested."

CONCLUSION

The petition for certiorari should be denied in all respects.

Respectfully submitted,

FRANK D. O'CONNOR,
District Attorney
Queens County

BENJ. J. JACOBSON,
Assistant District Attorney
of Counsel

December, 1962.